United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT TYRONE R. YOUNG

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

242

No. 21,504

Tyrone R. Young, Appellant,

v.

United States of America, Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Was appellant's pretrial confrontation so unnecessarily suggestive and conducive to irreparable mistaken identification that evidence thereof at appellant's trial resulted in a denial of due process of law?

2. Did appellant's pretrial identification alone and in the custody of police officers constitute *per se* a denial of due process of law?

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* Cases chiefly relied upon are marked by asterisks.

JURISDICTIONAL STATEMENT

Appellant Tyrone R. Young was indicted on a charge of robbery, D.C. Code § 22-2901 (1967). On pleading not guilty, appellant was tried before a jury in the United States District Court for the District of Columbia. Appellant was found guilty and sentenced to a term of eight years under § 5010(c) of the Federal Youth Corrections Act, 18 U.S.C. § 5010 (1964). Timely notice of appeal was filed.

The District Court had jurisdiction pursuant to the Act of December 23, 1963, 77 Stat. 482, D.C. Code § 11-521 (1967). This Court has jurisdiction of the appeal pursuant to the Act of June 25, 1948, ch. 646, 62 Stat. 929, 930, as amended, 28 U.S.C. §§ 1291, 1294 (1964).

STATEMENT OF CASE

On October 6, 1966 Harry Irving Pomerantz was robbed of $181 belonging to Eckington Liquor, Inc. located at 111 Florida Avenue, N. E. Mr. Pomerantz, the only witness to the crime, testified that at approximately 11:00 A.M. a man came into his store and bought a pack of chewing gum (Tr. I, 56). The same man returned a few minutes later and with the use of a "chrome-plated

revolver" took $100 from the person of Mr. Pomerantz and $81 from the store's cash register (Tr. I, 56-58, 62). Mr. Pomerantz was able to describe the man as "light-skinned, about five-foot-six to five-foot-nine, about 135 to 145 pounds, wearing a trench-coat, dark sunglasses, and a dark hat" (Tr. I, 57).

Mr. Pomerantz telephoned the police, a "look-out" was broadcast, and appellant was arrested by Officers Robert Householder and William Doester of the Metropolitan Police Department near the intersection of First and S Streets, N. W. Appellant was found with $181 in his possession and a toy pistol (Tr. II, 47-48). The arresting officers took appellant to the premises of Eckington Liquor and informed Mr. Pomerantz that they thought they had the robber and wanted the witness to identify him (Tr. II, 24). Mr. Pomerantz was told that the suspect had been arrested with the stolen money (Tr. II, 35) and was then shown the suspect, who was in handcuffs (Tr. II, 93). At first Mr. Pomerantz failed to identify appellant, stating "that doesn't look like him" (Tr. II, 25). Whereupon, Officer Householder showed Mr. Pomerantz the toy pistol found on appellant which Mr. Pomerantz recognized as the "revolver" used (Tr. II, 60). The officers then put sunglasses, a trench coat, and hat on appellant, and Mr. Pomerantz was able to make a positive identification (Tr. I, 65).

At appellant's trial, evidence of the foregoing was admitted, and in addition, Mr. Pomerantz identified appellant in court (Tr. I, 66). Under cross-examination, however, the witness conceded that he did not get a good look at appellant's face. Mr. Pomerantz was not sure that he had looked at the man who had bought the chewing gum from him (Tr. II, 18). He was also unable to state that he had had a good opportunity to view the robber's face when he saw the man the second time (Tr. II, 19):

> Q. All that stood out and made any impression on your mind was the sunglasses and hat?
>
> A. Was the sunglasses and hat and the raincoat, because, if someone comes to you with dark glasses on, you do not see the face, you see only the impression.

Appellant's defense was mistaken identity. Appellant did not take the stand, but two witnesses were called on his behalf. Miss Betty Jane Wright testified that on the morning of October 6, 1966, she and appellant were at appellant's home located at 1813 First Street, Northwest (Tr. II, 101). Appellant arose at about 10:30 A.M., "dumped the trash" and left the house to take his coat to the cleaners (Tr. II, 102). Miss Wright testified that appellant left the house with approximately "180 or $181.00" in his possession, money which appellant and Miss Wright had been saving for an apartment (Tr. II,

103). Miss Wright was certain of the amount because she and appellant had counted their money on the morning of October 6 (Tr. II, 109). A neighbor of appellant, Mrs. Delores Payton, testified that she saw appellant go by her house at 77 S Street, Northwest towards Florida Avenue, and about three minutes later she saw him returning on First Street (Tr. II, 113) and witnessed his arrest (Tr. II, 112).

Subsequently, at about 1:00 P.M. on the same day, Mr. Pomerantz was taken to Metropolitan Police Department Headquarters, where he was shown two photographs, both of the appellant, and again Mr. Pomerantz made an identification. See Transcript of Preliminary Proceeding before U. S. Commissioner at p. 27, set forth in Appendix hereto.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF POINTS

1. Appellant's conviction should be reversed because of an in-court identification by the complaining witness which was based exclusively on (a) a pretrial identification of appellant in person and (b) a

subsequent pretrial photographic identification, both of which took place in circumstances which cast significant doubt on the accuracy of the identifications.

2. The failure of the police to present appellant in a lineup for the purpose of a pretrial identification by the complaining witness requires reversal of appellant's conviction since evidence of the identification was admitted at appellant's trial.

SUMMARY OF ARGUMENT

Appellant was taken immediately after his arrest to the scene of the robbery for possible identification. The complaining witness was initially unable to make the identification, even after the arresting officers had stated their belief in the guilt of appellant. The officers showed the witness a pistol which the witness identified as the one used. The officers then placed a hat, coat, and a pair of sunglasses on the handcuffed suspect, after which the witness was able to make a positive identification.

A pretrial identification under such circumstances is so unnecessarily suggestive and conducive to mistaken identification that the admission of evidence thereof at appellant's trial deprived appellant of the due process protection guaranteed by the Fifth Amendment of the United

States Constitution. See Wright v. United States, No. 20,153 (D.C. Cir. Jan. 31, 1968); Palmer v. Peyton, 351 F.2d 199 (4th Cir. en banc 1966); Stovall v. Denno, 388 U.S. 293 (1967) (dictum). Especially is this true when the in-court identification is buttressed by a pretrial photographic identification where only the accused's photograph is shown. See Simmons v. United States, 390 U.S. 377 (1968); Smith v. United States, No. 20,773 (D.C. Cir. June 7, 1968).

Moreover, a pretrial identification of a suspect alone and in the custody of police officers without justification constitutes a denial of due process. See Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967); Wise v. United States U.S.App.D.C. , 383 F.2d 206 (1967). Appellant should have been afforded the protection of a lineup, unless it can be shown that the arresting officers proceeded to the scene of the crime for reasons other than to confront the witness with the suspect.

I. APPELLANT'S PRETRIAL CONFRONTATION WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION THAT EVIDENCE THEREOF AT APPELLANT'S TRIAL RESULTED IN A DENIAL OF DUE PROCESS OF LAW

The identification of appellant by the victim and sole witness of the robbery shortly after it occurred was based on factors which demonstrate that no positive identification was made. When appellant was first presented, wearing the clothes in which he was arrested, the complaining

witness was unable to identify appellant (Tr. I, 730; II, 59). Not until after the arresting officer put a trench coat, hat, and a pair of sunglasses on appellant was the witness able to identify him as the robber (Tr. I, 65). At appellant's trial, the testimony of the complaining witness revealed that the sole basis for his identification was the apparel the police officers placed on appellant (see Tr. II, 19 and 21).

The following response of the witness to a question by Judge Bryant is particularly significant (Tr. II, 13-14):

> THE COURT: * * *
> He wants to know whether or not, without the trench coat, the dark glasses and black hat, without that attire you would have been able to recognize the defendant?
>
> THE WITNESS: No, sir, I do not think so.

This testimony makes it clear that no valid identification of the person of appellant took place. Only apparel similar to that worn by the robber was recognized by the witness. Clothes, not accompanied by any distinguishing pattern or color, are clearly an insufficient basis for a positive identification.

The weak foundation for the purported identification is especially important when coupled with the highly suggestive circumstances in which the witness identified

appellant. As stated by the Supreme Court in United States v. Wade, 388 U.S. 218, 228 (1967):

> A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.

In this case the number of extraneous factors influencing the witness at the time of identification raises significant doubt as to the objectivity of the witness and the validity of his purported identification.

After the arrest of appellant, information that a suspect had been taken into custody was radioed to officers at the scene of the robbery (Tr. II, 57). Before conducting the witness to the car where appellant was held, the officers stated to the witness that they thought they had the robber (Tr. II, 24). This alone is considered a highly suggestive procedure. See United States v. Wade, 388 U.S. 218, 233 (1967). In addition, the police officers told the witness that the appellant had been arrested with the stolen money (Tr. II, 35). Appellant was then presented to the witness in handcuffs (see Tr. II, 93). As stated by the Supreme Court respecting presentation of a suspect alone and handcuffed to police officers:

> It is hard to imagine a situation more clearly conveying the suggestion to the

> witness that the one presented is believed guilty by the police. [United States v. Wade, 388 U.S. 218, 234 (1967).]

When the witness was unable to identify appellant, the arresting officer showed the witness a cap pistol which the witness identified as the weapon used by the robber (Tr. II, 60). This Court has indicated that a witness' recognition of an instrument used by the perpetrator of a crime prior to an identification is a fact which casts doubt on the objectivity of the identification. Wright v. United States, No. 20,153 (D.C. Cir. Jan. 31, 1968). Finally, only after placing sunglasses, hat and coat on appellant was the witness able to make an identification.

The existence of these unnecessarily suggestive factors on the witness at the time of the identification is sufficient to establish a denial of due process. When considered in relation to the basis for the identification, the clothes placed on appellant, their significance is all the greater. In view of these circumstances, it must be concluded that the admission of evidence of the pretrial identification at appellant's trial failed to conform to the minimum standards required by the due process clause of the Fifth Amendment of the United States Constitution. See Palmer v. Peyton, 351

F.2d 199 (4th Cir. en banc 1966); see also Stovall v. Denno, 388 U.S. 293 (1967) (dictum). The identification came within the standard for reversal of the conviction established in the Stovall case, i.e., it was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." 388 U.S. at 302.

This Court recently considered the due process issue in a pretrial identification of an accused. In Wright v. United States, No. 20,153 (D.C. Cir. Jan. 31, 1968), police officers arrested a robbery suspect between twenty-five and fifty-five minutes after the robbery occurred. A witness to the robbery was brought to a precinct station to make an identification. Near the station the witness noticed an automobile which she had seen the robbers use. The witness was then escorted to a room in the station where the suspect was seated with about a half-dozen police officers in plain clothes, several of which were Negroes as was the suspect. The suspect was asked to stand for observation. At some point during the presentation the witness identified the suspect. At the trial, the accused was identified in court twice by the witness, and evidence of the pretrial identification was admitted without objection.

On appeal, the appellant urged that the precinct station identification was not the product of the witness'

objective judgment and that the prosecution's capitalization on it resulted in a deprivation of due process. This Court accepted in part appellant's contention by stating, "The record before us reflects conditions auguring the possibility that the limits set by the demands of due process were exceeded here." Wright v. United States, supra, at 5. Accordingly, the Court remanded the case to the District Court for a determination of whether "the method of appellant's identification was 'so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.'" Ibid at 8.

The record in the instant case is sufficient to show circumstances conducive to a mistaken identification. If the court should not so find, then the precedent established in Wright should be followed, and the case should be remanded for a determination by the District Court of the due process issue. See Smith v. United States, No. 20,773 (D.C. Cir. June 7, 1968). Nor does this Court's holding in Wise v. United States, U.S.App.D.C. , 383 F.2d 206 (1967) require a different result. In that case it was stated that prompt identification of a suspect was desirable and accordingly evidence of the identification was held no violation of due process. However, the Court recognized that there may be cases where "the particular identification at the scene was conducted in such an unfair way that it cannot

tolerably be admitted into evidence." 383 F.2d at 210. Few of the suggestive influences present in this case can be found in the circumstances of the post-arrest identification in the Wise case.*

The prejudicial nature of the evidence of appellant's pretrial identification was in no way cured by the in-court identification of appellant by the complaining witness. The following testimony of the witness reveals that the in-court identification was not "based upon observations of the suspect other than the [pretrial] . . . identification. . . ." (United States v. Wade, 388 U.S. 218, 240 (1967)):

> Q Since you didn't identify Mr. Young at the liquor store without the sunglasses, the hat and the raincoat, would you explain briefly . . . how you feel you were able to do that yesterday?
>
> A Yes, sir, after the sunglasses, the hat and the coat were removed, I saw the gentleman's face, so, therefore, that is the same gentleman which I saw after the glasses, the coat and the hat were removed. It is the exact, identifical face. [Tr. II, 35.]

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* It is not clear from the opinion in Wise whether testimony of a witness who pursued the accused and claimed never to have lost sight of him was admitted at trial in addition to testimony by a witness making a voice identification. The only question submitted to the Court was the propriety of the latter. However, the existence of the positive testimony of an eyewitness would be a strong reason for not reversing on due process grounds.

The ability of the witness to identify appellant in court was aided by viewing photographs of appellant at police headquarters. See Tr. II, 32 and Transcript of Preliminary Proceeding before U. S. Commissioner at p. 27, as set forth in Appendix hereto. This identification itself is questionable on due process grounds under the principles recently enunciated by the Supreme Court in Simmons v. United States, 390 U.S. 377 (1968). The Court there held that a pretrial identification by means of photographs is subject to the same due process test used in Stovall. However, the Court found no fault in the case before it since at least six photographs were shown to the witnesses, and they were primarily group photographs. The Court concluded that there was little chance that the procedure used led to a mistaken identification.

In the instant case little is known of the circumstances of the photographic identification except that only two pictures of the same man were shown. See Appendix. The dangers inherent in such a practice are obvious. See 390 U.S. at 383. Where the record of a pretrial photographic identification is incomplete, this Court has required remand for the taking of evidence and findings on the due process question. Smith v. United States, supra.

Since the evidence clearly establishes that the witness' in-court identification was not based on anything

other than observations of appellant and appellant's picture after his arrest, this Court should vacate appellant's conviction and order a new trial with instructions that no in-court identification be permitted and, in addition, that no evidence of either pretrial identification be admitted.

II. THE PRETRIAL IDENTIFICATION OF APPELLANT ALONE AND IN THE CUSTODY OF POLICE OFFICERS WITHOUT JUSTIFICATION CONSTITUTED PER SE A DENIAL OF DUE PROCESS OF LAW

Following his arrest, appellant was brought to the scene of the crime where he was identified by the complaining witness. Identification of a suspect in the absence of a lineup has been widely condemned. See Stovall v. Denno, 388 U.S. 293, 302 (1967) and authorities cited therein; Wise v. United States, U.S.App.D.C. , 383 F.2d 206, 209 (1967). There must be clear justification for presenting a suspect without the protection afforded by a lineup. See, for example, Stovall v. Denno, supra. As stated by Chief Judge Bazelon:

> The clear thrust of Stovall is that, without justifying circumstances, a one-man showup is too unnecessarily suggestive to satisfy due process. A lineup must be conducted unless it will necessitate a delay which is likely to make identification impossible or less reliable. [Wright v. United States, No. 20,153 (D.C. Cir. Jan. 31, 1968) (dissenting opinion) at 10.]

The circumstances of this case, it is submitted, do not justify a departure from the requirement of conducting

a lineup. In Stovall a murder suspect was brought to the hospital room of a witness in critical condition as a result of multiple stabbings by the murderer. The suspect, who was handcuffed to a police officer and was the only suspect presented, was identified by the witness. The Supreme Court held that the admission of the pretrial identification at the accused's trial did not amount to a denial of the due process clause of the Fourteenth Amendment. The justification for not holding a lineup was, in the opinion of the Court, that an immediate confrontation was "imperative." The Court adopted the reasoning of the Court of Appeals, quoting:

> Faced with the responsibility of idenfifying the attacker, with the need for immediate action and with the knowledge that [the witness] . . . could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station lineup, which Stovall now argues he should have had, was out of the question. 388 U.S. at 302. [Emphasis added.]

Similarly, in Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court upheld a conviction challenged on the ground, among others, that a pretrial identification by means of photographs was so unnecessarily suggestive and conducive to mistaken identification as to amount to a denial of due process. The Court stressed that, with the perpetrators still at large, it

was "essential" for the FBI agents to act swiftly. The Court concluded, by stating, 390 U.S. at 385:

> The justification for this method of procedure was hardly less compelling than that which we found to justify the "one-man lineup" in Stovall v. Denno, supra.

It is clear that in the instant case there was no imperative need for an immediate identification of appellant. However, this Court has held that a lineup may be dispensed with for other reasons. In Wise v. United States, U.S.App.D.C. , 383 F.2d 206 (1967), the police captured a suspect "only a few blocks and minutes away" from the scene and time of the crime and brought the suspect back to the scene to be identified by one of the victims. The court held that there was no denial of due process, stating:

> The presentation of only one suspect, in the custody of the police, raises problems of suggestibility that bring us to the threshold of an issue of fairness. But that it is generally the case with confrontations immediately after hot pursuit.
>
> Here was a confrontation proximate to the scene and time of the offense as well as the apprehension, where the observers and actors were limited to those that were in fact present at the scene and time of the offense and the chase. Here were circumstances of fresh identification, elements that if anything promote fairness, by assuring reliability, and are not inherently a denial of fairness. [383 F.2d at 209.]

In the instant case appellant was also apprehended shortly after the crime and taken to the scene of its occurrence. However, both the time elapsed and the distance involved appear to have been greater here than in Wise. Appellant was arrested approximately ten minutes after the robbery occurred (Tr. II, 62) at a distance calculated as between three and seven blocks (Tr. II, 75). Nor was appellant being pursued as was the case in Wise. While the differences are matters of degree only, they are sufficient differences to require a contrary disposition. In Wise, where one witness never lost sight of the accused and an arrest was made within minutes, it was all but inevitable that the police would return to the scene of the crime, if only to escort the pursuing witness to his home. However, in this case appellant's arrest was sufficiently separate from the time and place of the crime that the orderly course of events would not require returning to the scene of the crime. It would have been more responsible for the police to have proceeded to appellant's home, one block away, to ascertain if appellant had just left the house. In fact, the sole reason of the arresting officers for taking appellant to the scene of the crime was to seek an identification. The justification required by Stovall and Simmons for the confrontation did not exist.

While a fresh identification may assure reliability, little is lost if the confrontation is delayed by a matter of minutes by bringing the witness to a precinct station or arranging for a lineup at the scene of the crime. Therefore, unless it can be shown that arresting officers have some reason to bring a suspect to the scene of the crime, other than for purposes of an immediate confrontation, it is urged that no justification exists for presenting the suspect alone to the witness and that such action constitutes a deprivation of due process. To rule to the contrary would only establish a means of avoiding both the protection afforded by the due process clause and the Sixth Amendment, for as counsel must now be present at post-indictment confrontations, law enforcement officials will seek to make use of the time immediately after an arrest, for which the constitutional protection of counsel has not yet been established, to obtain an identification.

Alternatively, it is submitted that this Court's decision in Wise does not conform to the standards set forth in the Stovall and Simmons cases. Those cases sanctioned pretrial identifications only when circumstances required such action. That necessity cannot be found in Wise v. United States, supra.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of conviction of the District Court.

Respectfully submitted,

/s/ J. Sumner Jones

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July 1, 1968

A That's correct.

Q You say a trench coat, a hat and glasses?

A That's correct.

Q Did you subsequently go to Metropolitan Police Department Headquarters concerning this robbery?

A Yes; I went down to Robbery.

Q Were you shown photographs?

A What's that?

Q Were you shown photographs of possible suspects?

A Yes. Yes.

Q When were you shown these photographs?

A What's that?

Q When were you shown --

A When I was up there, by the officer here. Up at Robbery. About an hour and a half later. Because I couldn't get relief at the store. I got there about 1:00 o'clock.

Q And how many photographs were you shown?

A One. No; two, actually. Two pictures.

Q Of the same man?

A Of the same man.

Q Were you shown photographs of any other persons?

A No.

Q And did you at that time identify him?

A Yes. I did.

Q The defendant?

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,504

TYRONE R. YOUNG, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

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United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

JEROME M. FEIT,
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ISSUE PRESENTED

Whether the on-the-scene identification of appellant by the robbery victim ten minutes after the robbery occurred was impermissibly suggestive of misidentification where the victim was unable to identify appellant as the robber until the latter put on items of attire worn by the robber during the crime, which items appellant was found in possession of at the time of his arrest moments after the robbery.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,504

TYRONE R. YOUNG, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After a jury trial held on May 10-11, 15-16, 1967, appellant was convicted on a one-count indictment charging him with robbery. (22 D.C. Code § 2901.) On November 17, 1967, he was sentenced under the Youth Corrections Act (18 U.S. Code § 5010(d)) to eight years' imprisonment.

The Government's evidence showed that on October 6, 1966, Eckington Liquor, Inc., located at 111 Florida Avenue, N.E., was robbed of $181. Henry Irving Pomerantz, the proprietor of the store, testified that at about 11:00

a.m. that morning a man came into the store, bought a pack of chewing gum, and walked out (Tr. I, 56). A few minutes later, this same man came back into the store and, using a chrome-plated revolver (Tr. I, 58, 60), took $100 from Mr. Pomerantz' person (Tr. I, 56) and $81 from the cash register, including a $2 bill (Tr. I, 62). As the robber left, he made Mr. Pomerantz lay down on the floor and threatened him with bodily harm if he moved before ten minutes were up (Tr. I, 57).

A few minutes after the robber left, Mr. Pomerantz called the police, advised them of the robbery, and gave them a description of the robber—i.e., he was "light-skinned, about five-foot-six to five-foot-nine, about 135 to 145 pounds, wearing a trenchcoat, dark sunglasses, and a dark hat." This information was immediately broadcast to police radio cars (Tr. I, 57; Tr. II, 14, 109, 47). Moments later, officers Robert Householder and William Doster of the Metropolitan Police Department, who had heard the radio report, observed appellant about three blocks from the scene of the robbery. Protruding from his right front pocket was the handle of what appeared to be a revolver. On the basis of the fact that he appeared to be the person described in the radio report, they arrested the appellant (Tr. II, 47). At that time, the appellant was wearing dark trousers, a dark waist-length jacket, and was carrying a white trenchcoat on his left arm. In his left hand he had a dark brown hat. A search of his person uncovered the revolver and $181 in bills (the precise amount stolen in the robbery), among which was a $2 bill. He also had a pair of dark sunglasses (Tr. II, 48-51).

The arresting officers immediately took appellant to the nearby Eckington Liquor Store. Mr. Pomerantz was told that a "suspect" had been picked up (Tr. II, 22, 24), and was requested to step outside to look at the appellant. He went outside, quickly glanced at the appellant's attire and said that he was not sure if the appellant was the robber. As Mr. Pomerantz explained at trial, "[I] didn't bother to look up at his face. I was looking for a man with a

trenchcoat on and I seen him with a black three-quarter coat on. That is what threw me off." (Tr. II, 23, 24-27.) The officers then put the appellant's trenchcoat, sunglasses, and hat on him and Mr. Pomerantz was able to make a positive identification (Tr. I, 64-65). At trial, testimony by Mr. Pomerantz of the post-robbery confrontation was fully developed before the jury (Tr. I, 64-65) on both direct and cross-examination (Tr. II, 9-28) and admitted, without objection. In addition, Mr. Pomerantz made an in-court identification of appellant (Tr. I, 66).[1]

Appellant, who did not take the stand, called two witnesses in his defense. Miss Betty Jane Wright, the appellant's girlfriend, with whom he was living at the time, testified that appellant had approximately $180 or $181 in his possession when he left their apartment at about 10:30-10:45 a.m. on the morning of the robbery (October 6, 1966) to take his coat to the cleaners (Tr. II, 101-102). On cross-examination, Miss Wright stated that she knew it was $181 because she had counted it before the appellant left the apartment. However, in response to the question, "Did you see any two-dollar bills in there?," Miss Wright answered, "No, I didn't." (Tr. II, 109). A neighbor of the appellant, Mrs. Delores Payton, testified that she had seen the appellant walking away from the scene of the robbery shortly before it had occurred. She also testified that a few moments later she saw the police arrest him (Tr. II, 111-115). On cross-examination, Mrs. Payton testified that when she saw the appellant he had nothing in his hands (Tr. II, 116). Yet, when he was arrested, officers Householder and Doster testified that he was carrying a trenchcoat over his left arm and a dark hat was in his left hand (Tr. II, 48).

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[1] When asked by defense counsel how he could identify appellant in court since he was not attired as he had been at time of the robbery (Tr. II, 31-32), Mr. Pomerantz made clear that his trial identification was based on the post-robbery identification. (Tr. II, 35)

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seize or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

The victim of the robbery positively identified appellant as its perpetrator on the day of the robbery when the appellant was brought back to the scene of the offense, possessed of items of clothing identical to those worn by the robber and the precise amount of money (including a $2 bill) stolen in the robbery. This confrontation occurred within ten minutes of the offense. It came at a time when the memory of the witness was fresh, and it therefore assured the reliability of the identification. Under the totality of the circumstances, it cannot be said that the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

ARGUMENT

The on-the-scene identification moments after the robbery was not violative of due process standards and the victim's eye-witness identification testimony was therefore properly admitted at trial.

(Tr. II, 18-20, 35)

In *Stovall* v. *Denno*, 388 U.S. 293 (1967), the Supreme Court stated that whether a pretrial identification procedure is vulnerable to a due process attack depends upon the totality of the circumstances. In amplifying this rule

in *Simmons* v. *United States*, 390 U.S. 377 (1968), the Supreme Court stated that "convictions based on eye witness identification at trial following a pretrial identification by photograph [or by a 'one man lineup' as in *Stovall*] will be set aside on that ground only if the * * * identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." [2] *Id.* at 384.

We stress initially that since appellant failed to seek the exclusion of the eye witness testimony at trial, he should not be heard to make this claim of unfair identification for the first time on appeal. Cf. *Jones* v. *United States*, 362 U.S. 257, 264 (1960); *Segurola* v. *United States*, 275 U.S. 106, 109-111 (1927). There is in any event no merit to appellant's contentions in this regard.

This is not the case of a "one-man" showup long after the events with the obvious dangers to a valid identification inherent in such delay. Rather, this is a case in which the identification took place minutes after the robbery, at a time when the event was fresh in the mind of the victim. Immediate confrontation in these circumstances insured rather than detracted from fairness. It provided the victim with an immediate opportunity to make a reliable identification of a suspect whose guilt was already strongly suggested by independent evidence. At the same time, it afforded the suspect the benefit of a test of the validity of his custody in circumstances promoting trustworthiness. As this Court recently pointed out in sustaining on-the-street identification in substantially similar circumstances, "such nearby identification while the memory of the witness is fresh is plainly 'effective and intelligent law enforcement.'" *Wise* v. *United States*, 127 U.S. App. D.C. 279, 383 F.2d 206, 209 (1967), *cert. denied* 390 U.S. 964; see also, *Wright* v. *United States*,

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[2] The pretrial identification here occurred prior to June 12, 1967. Accordingly, there is no issue of whether the identification procedures violated the counsel requirements of *United States* v. *Wade*, 388 U.S. 318. See *Wright* v. *United States*, D.C. Cir. No. 20,153, decided January 31, 1968.

(No. 20,153, decided January 31, 1968, slip op. 10, fn. 2) where Chief Judge Bazelon observed that a "one-man showup" in comparable circumstances "was justifiable because * * * the fresh identification promoted fairness by assuring reliability. Moreover, the identification took place at the scene of the offense rather than in the suggestive atmosphere of a police station."

Nor is there any merit to the claim that the identification in this case was rendered fatally defective because appellant was required to garb himself in the attire worn by the robber. The items that appellant was asked to put on were not provided by the police but were those found in appellant's possession at the time of his arrest minutes after the robbery. Indeed, it would have been inappropriate to seek identification in any other way inasmuch as the victim made clear in his trial testimony that his memory of the robber was inextricably tied to the manner in which the robber was attired. (See *e.g.* Tr. II, 18-20) On this point the *Wise* decision also controls. In *Wise*, a man and his wife arrived home and found that their residence had been broken into and the intruder was still about upstairs. As the intruder came downstairs and fled, the husband gave chase. Eventually, the husband caught the defendant and, with the help of policemen who had arrived, brought him back to his residence, a few blocks away, the purpose being so that the wife could identify him. However, the wife stated that she could not identify the intruder by sight, but could recognize his voice. The police asked the defendant to speak the words the intruder had spoken; he did so and the wife identified him as the intruder.

Just as the procedures in *Wise*, including the requirement that the robber speak the words of the intruder, were held not to deviate from "the rudiments of fair play," so the requirement that appellant put on the garb of the robber was consonant with the concept of fundamental fairness. Indeed, if anything, the procedures employed in the instant case underscore that the officers were seeking to implement the fairest identification procedure

possible in the circumstances. The victim was thus allowed to see the suspect attired in the garb he had seen the robber wear but a few minutes before—a procedure which would assure that the identification would be based upon the victim's own memory of the events and not stem from any official suggestiveness. Appellant's argument of unfairness is particularly unfounded since the items which appellant put on for the identification purposes were the very same items found on his person at the time of arrest.[3]

Appellant also attacks, as being impermissibly suggestive, the pretrial viewing of photographs by the witness. However, as the victim testified, his in-court identification of the appellant was based on the pretrial confrontation immediately after the robbery (Tr. II, 35). It is apparent that the subsequent viewing of two photographs of the appellant a couple of hours after the robbery had minimal, if any, effect on his in-court identification. Accordingly, there is no reason to remand for a hearing on the photographic identification issue as a majority of a panel of this Court thought necessary in *Smith* v. *United States*, D.C. Cir. No. 20,773, decided June 7, 1968, where the identification rested primarily on the viewing of photographs.

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[3] We stress in this regard that wholly apart from the identification the evidence was more than ample to support the jury verdict of guilty. The uncontroverted facts establish that appellant, who matched the physical description of the robber, was arrested within five to ten minutes after the robbery occurred, some three blocks from the scene of the crime. At this time, the exact amount of money stolen from the liquor store, which included a $2 bill, was found on him, as was a chrome-plated revolver, which matched the description of the one used by the robber. In addition, appellant was carrying a trenchcoat identical to the one worn by the robber, as well as a dark hat and sunglasses, which the robber also had on at the time of the offense.

Moreover, the jury was well acquainted with all the conditions surrounding the pretrial confrontation which had been fully developed on cross-examination (See Tr. II, 9-28). It could, therefore, judge what weight was to be accorded to this evidence in light of the victim's testimony that his in-court identification was based on this pretrial confrontation.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT TYRONE R. YOUNG

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,504

Tyrone R. Young, Appellant,

v.

United States of America, Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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TABLE OF CASES

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* Case chiefly relied upon.

I. THE IDENTIFICATION OF APPELLANT AT THE SCENE OF THE CRIME WAS CONDUCTED IN SUCH AN UNFAIR WAY THAT IT SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

The complaining witness identified appellant at the scene of the robbery shortly after the crime was committed. Because of the place and time of that confrontation, the Government argues that Wise v. United States, 127 U.S.App. D.C. 279, 383 F.2d 206 (1967), cert. denied 390 U.S. 964 (1968), is controlling on the due process issue raised by appellant.

In Wise this Court held that an immediate presentation of a single suspect to a witness at the scene of a crime was not "inherently" unfair since a fresh identification would promote reliability. But the Court did not give blanket approval to such procedure. It recognized that there may be cases where "the particular identification at the scene was conducted in such an unfair way that it cannot tolerably be admitted into evidence." 383 F.2d at 210. The Wise case suggests that the advantage of a fresh identification is one of the many factors to be weighed in deciding the due process question.

The Government chooses to ignore most of the facts in the instant case which prevented the complaining witness from making an objective identification. The Government concedes that at the time of appellant's

identification his "guilt was already strongly suggested by independent evidence." The error in this case lies in the fact that this evidence was communicated by the police to the witness prior to the confrontation. Not only did the police officers tell the witness that they thought they had the robber, they further suggested appellant's guilt by (1) informing the witness that appellant was arrested with the stolen money, (2) showing the witness a cap pistol which the witness identified, and (3) placing clothes on appellant similar to those worn by the robber. Presentation of a suspect alone in the custody of police is considered highly suggestive, although not necessarily a sufficient fact by itself to require reversal. Stovall v. Denno, 388 U.S. 293 (1967); Wise v. United States, supra. But when accompanied with other suggestive influences, the conviction should not be permitted to stand.

The Government claims that it is proper to require a suspect to wear certain clothes when he is presented for identification. Appellant does not argue that a suspect can never be required to put on certain items of clothing in such circumstance. But use of clothing for the purpose of influencing the witness is clearly improper. In Palmer v. Peyton, 359 F.2d 199 (4th Cir. en banc 1966), where a conviction was reversed because a pretrial identification failed to meet due process standards, one of the prejudicial

facts emphasized by the court was the showing to the witness of the suspect's shirt, the color of which was similar to the color previously identified by the witness as that of the shirt worn by her attacker.* Here the police officers had been unable to obtain an immediate identification. In their zeal to have appellant identified, they placed the hat, coat and sunglasses on him, knowing these items were part of the description given by the witness and knowing it would influence his judgment.

Requiring appellant to put on the apparel is significant for a second reason. Without it, as the witness conceded, he could not have identified appellant (Tr. II, 13-14). An identification based on clothes worn by the suspect is clearly so tenuous that it is subject to suggestive influences. These were readily provided by the arresting officers after the initial confrontation failed to result in a positive identification.

II. THE PHOTOGRAPHIC IDENTIFICATION OF APPELLANT WAS CONDUCTED IN A MANNER IMPERMISSIBLY SUGGESTIVE.

The second identification of appellant, which occurred when the complaining witness viewed two photographs of

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* See also Crume v. Beto, 383 F.2d 36 (5th Cir. 1967), where the court criticized a showing where the suspect was forced to wear incriminating items, but found no denial of due process because the witness had previously made a tentative identification of the suspect.

appellant at police headquarters, was clearly under circumstances "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). Evidence of this identification was not admitted at appellant's trial. However, if based upon the photographic identification, the in-court identification should not have been permitted at appellant's trial. See United States v. Trivette, 284 F. Supp. 720 (D.C.D.C. 1968).

The Government seeks to base the in-court identification exclusively on the first pretrial identification by referring to the testimony of the witness in this regard (Tr. II, 35). However, further evidence is required for the trial court cut short testimony of the witness which would have related to the photographic identification:

> THE COURT: * * *
> His question to you is, how were you able to look at him in court and say that this is the man who robbed you, with no sunglasses, no trench coat and no black hat?
>
> * * *
>
> THE WITNESS: Because, when they took me down to the Robbery Squad, I looked - -
>
> THE COURT: Wait a second. Come to the bench. [Tr. II, 31.]

Finally, the Government argues that the due process question cannot be raised on appeal for the first time.